United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOSEPH DE LORRAINE

Plaintiff-
Appellant

-against-

MEBA PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. KILLOUGH, Individually and in her capacity as Administrator of the MEBA Pension Trust

Defendants-
Appellees

Appeal From the United States District Court for the Southern District of New York

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APPELLANT'S BRIEF

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ISSUES PRESENTED

1. Do Federal Courts have jurisdiction over claims arising under §302(c)(5) of the Taft-Hartley Act, 29 USC §186(c)(5)?

2. Under all of the circumstances of this case, is the defendant MEBA Pension Trust subject to Federal jurisdiction under the Age Discrimination in Employment Act of 1967, 29 USC §§621-634?

3. Does the complaint state a cause of action under 29 USC §623?

4. Does the mandatory retirement program of the defendant constitute a good faith retirement plan as defined in 29 USC §623(f)(2), or is it a subterfuge designed to avoid the purposes of the Age Discrimination in Employment Act of 1967?

STATEMENT OF THE CASE

This case involves a dispute between a Taft-Hartley Act Pension Plan Trust participant and the Administrator and Trustees of the plan. In the District Court, the defendant was awarded summary judgment based upon the complaint and its motion to dismiss and supporting affidavits. Following dismissal, the plaintiff, pursuant to court order, filed an amended complaint. Summary judgment was again entered, based upon the court's determination that it lacked jurisdiction over the subject matter of the case.

Joseph DeLorraine (plaintiff-appellant, hereafter plaintiff) is a marine engineer, and a participant in the defendant pension plan, the MEBA Pension Trust (hereafter the Pension Trust). The Pension Trust is financed by employer contributions pursuant to a collective bargaining agreement, and is thus subject to the Taft-Hartley Act provisions governing such plans, 29 USC §185ff. A major feature of this particular pension plan is that it has a "service only" retirement qualification: any member who has twenty years of credited service can retire at any time, regardless of age. The plaintiff met this requirement and stopped working first in 1964. At that time, the defendant maintained a "swinging door" retirement policy: retirees were permitted to return to active employment at any time with approval from the trustees (A-6). Such

approval was routinely given (A-6). In order to qualify for the "swinging door" program, workers had to remain available for work (A-7). The plaintiff relied upon this program when he stopped working in 1964, and meticulously maintained his union membership and thus his availability for work as required by the regulations (A-7). In 1968, the plaintiff sought and obtained approval to return to active employment, and remained on active employment from 1968 to 1970 (A-7). In 1970, motivated by the desire of the union to minimize the number of older workers in favor of younger workers who would not be as concerned with retirement benefits (A-85) and who would benefit the union by paying school costs and initiation fees (A-8), the Pension Trust suddenly revoked the previously granted permission to return to work and ordered the plaintiff and others like him to stop working immediately upon pain of forfeiture of all pension benefit rights (A-8). The plaintiff stopped working under duress in 1972.

The plaintiff claims that the actions of the Pension Trust are unlawful in several respects. First, he claims that the practices described above constitute a violation of the Age Discrimination in Employment Act of 1967, 29 USC §621ff. Second, he claims that the plan as maintained by the Pension Trust violates the Taft-Hartley Act §302(c)(5), 29 USC §186(c)(5). Finally, he claims that the Pension Trust has violated its common law fiduciary duty toward him and that its conduct further gives rise to

promissory estoppel. The federal court has only pendent jurisdiction over these claims, and they will not be discussed in detail as they do not relate to the jurisdictional issues raised on this appeal.

The District Court explicitly ruled that the federal courts do not have jurisdiction over the plaintiff's Taft-Hartley Act claim (A-113) It also ruled that the Pension Trust did not come within the list of entities subject to the Age Discrimination in Employment Act (A-68), and said by way of dicta that even if the Pension Trust were subject to that Act, its retirement program was "reasonable" and thus came within the exception of 29 USC §623(f) (A-69).

SUMMARY OF ARGUMENT

The Pension Trust exists solely by authority of the Taft-Hartley Act. It is a national entity affecting thousands of workers. The better reasoned cases uphold Federal court jurisdiction over claimed structural defects in such plans. As an entirely separate matter, the complaint states a valid claim for relief based upon the Age Discrimination in Employment Act of 1967. The plaintiff claims an unlawful inter-action between the interests of the Pension Trust and the interests of the labor union whereby the Pension Trust policies were set in order to increase the rate of turnover and favor younger workers and penalize the plaintiff and those like him, all of which benefited the union treasury and the union-maintained training program. This is not a good faith retirement program, but is a subterfuge to evade the purposes of the Act, and the Pension Trust acted as the agent of the labor union in carrying out this subterfuge. The plaintiff should have been given the opportunity to conduct full pre-trial discovery and should have been accorded a trial to resolve the many sharp factual disputes shown in the record.

Point I.

The Plaintiff's Taft-Hartley Act Claim Should Be Decided in Federal Court.

After a short history of established abuse, the Taft-Hartley Act was amended to prohibit employer contributions to employee representatives. Several exceptions to this prohibition were granted. One such exception was given to employer contributions made pursuant to a collective bargaining agreement to finance employee retirement benefits, 29 USC §186(c)(5). However, Congress took great pains to specify definite conditions applicable to such funds: the fund has to be separately maintained, jointly operated by employer and employee representatives, held in trust, and, most importantly, must be operated

> "...for the sole and exclusive benefit of the employees of such employer, and their families and dependents..." [or of such persons in his employ or in the employ of others making similar contributions]. Id.

The history and purposes behind this legislation have been the subject of much discussion. The primary concern of Congress in this area is to prevent employers and employee representatives from acting in collusion to provide funds to the latter in exchange for "sweetheart" agreements which penalized the rank and file union members. See United States v. Ryan, 225 F.2d 417, 426 (2nd Cir. 1955)

rev'd 350 U.S. 229, aff'd on remand 232 F.2d 481 (1956).

The Pension Trust is required by law to operate as an independent entity to serve the interests of the plan participants. It is forbidden to serve the interests of the union or of the employers. Yet this is precisely the gravamen of the plaintiff's claim. He has alleged that the Pension Trust is being operated to serve the interests of the labor union:

1. To increase the number of younger members who will not be particularly concerned about retirement benefits (A-).

2. To increase the rate of turnover and thus increase the demand for the training program conducted by the Joseph Calhoon Training School, and also the amount of initiation fees collected by the union from new members.

3. To decrease the number of marine engineers in the work force in order to reflect the decreased demand for such workers following the wind down of the Vietnam conflict.

In short, the plaintiff claims just the kind of abuse which caused Congress to take elaborate precautions to protect retirement funds and pension plan participants. He is a beneficiary of an express trust. Roark v. Boyle, 439 F.2d 497 (DC Cir. 1970). He charges a trust action which is inconsistent with the statutory purpose and thus unlawful. Insley v. Joyce, 330 F. Supp. 1228, 1233 (ND

Ill. 1971). The Supreme Court has adopted the policy of viewing questions arising under Federal labor laws as appropriate subjects for evaluation under a standard to be developed and explicated by the Federal courts to preserve national uniformity and continuity. Lewis v. Benedict Coal, 361 U.S. 459 (1960); Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957). Although there is a division of opinion as to the existence of Federal jurisdiction over Taft-Hartley Act Pension Trust claims, the better reasoned decisions support such jurisdiction.

The statute provides:

> "The district courts of the United States...shall have jurisdiction, for cause shown...to restrain violations of this section [29 U.S.C. §186]." 29 U.S.C. §186(e).

This section was liberally construed to confer federal jurisdiction to enjoin a union disciplinary action that would have frustrated the purposes of the Act. Wilkins v. DeKoning, 152 F. Supp. 306 (E.D.N.Y. 1957). There is a substantial body of law in the District of Columbia Circuit, stressing the fiduciary relationship between the parties, the duty of fairness to all participants imposed by 29 USC §186(c)(5), and the obligation to conform to the requirements of due process. The court's attention is respectfully directed to these important decisions. Kosty v. Lewis, 319 F.2d 744 (DC Cir. 1963); Sturgill v. Lewis, 372 F.2d 400 (DC Cir. 1966); Roark v. Lewis, 401 F.2d 425 (DC Cir. 1968); Danti v. Lewis, 312 F.2d 345 (DC Cir. 1962);

LaVella v. Boyle, 444 F.2d 510 (DC Cir. 1971); Collins v. United Mine Workers, 298 F. Supp. 964 (D DC 1969) aff'd 439 F.2d 494 (DC Cir. 1970). These cases do not squarely involve the jurisdictional issue, because of the general equity jurisdiction conferred upon the Federal courts in the District of Columbia. However, they do clearly and unequivocally set forth the standard for review of trustee actions in Pension Trust cases and indicate the national effect of judicial rulings in this area.

Notwithstanding the cogent and compelling reasons for a policy of per se federal court jurisdiction over disputes involving Taft-Hartley Pension Trusts, past decisions outside of the District of Columbia have failed to enunciate such a rule. In Porter v. Teamsters Health, Welfare, and Life Insurance Funds of Philadelphia, 321 F. Supp. 101 (ED Pa. 1970), the court analyzed the decisions as creating a distinction between cases alleging "structural violations" as opposed to those alleging violations of fiduciary duties or standards of prudence in the internal administration of the fund, holding that Federal courts have jurisdiction over "structural violations."

In this case, Judge Tyler adopted a rather narrow reading of this jurisdictional standard, and held that such a structural violation was only one found within the four corners of the original agreement to creat the Pension Trust (A-10). In this, he differs from the analysis adopted in Porter: in that case, the court held that it had

jurisdiction over a claimed conspiracy to divert trust funds to the use of the trustees, one which arose after the initial creation of the trust. Id, at page 104. The court said:

> Let us suppose...that a trust fund is created and initially administered in accordance with the structural requirements of §302(c)(5). If at some future point during the trust's existence it were either amended or administered in such a way as not to comply with those provisions, such would be a structural violation over which this court would have jurisdiction under §303. Id. [emphasis added]

He also differs in analysis from the approach adopted by Judge Bartels in Sanchez Lugo v. The Employees Retirement Fund of the Illumination Products Industry, 366 F. Supp. 99 (ED NY October 12, 1973, 73 C 663). In that case, the court sustained federal jurisdiction over a claim that the eligibility requirements were arbitrarily exclusionary and a claim that the method of deciding disability pension applications denied due process to the claimant. In so holding, the court cited inter alia Insley v. Joyce, 330 F. Supp. 1228, and quoted this portion of that decision:

> A pension plan which excluded a sizeable number of union members, with no reasonable purposes behind their exclusion, may, in fact, fail to be for the sole and exclusive benefit of employees as Congress used that term...
> At page 1233.

Judge Bartels reviewed the structure of the trust

fund not only in terms of what was explicitly authorized in the agreement, but also in terms of what was authorized by the agreement and later put into effect by the trustees under the powers conferred upon them. Under this more practical rule, Federal jurisdiction extends to a claim such as the one at bar, consistent with authority in other jurisdictions. Copra v. Suro, 236 F.2d 107, 115 (1st Cir. 1958); In Re Bricklayers Local #1 of Pennsylvania Welfare Fund, 159 F. Supp. 37 (Ed Pa. 1958); Raymond v. Hoffman, 284 F. Supp. 596 (ED Pa. 1966); Upholsterer's International Union of North America v. Leathercraft Furniture Co., 82 F. Supp. 570 (ED Pa. 1949); Barbot v. Frackman, 191 F. Supp. 171 (SD NY 1961).

Point II

The Complaint States a Cause of Action Under the Age Discrimination in Employment Act of 1967.

The Age Discrimination in Employment Act of 1967, 29 USC §621ff (hereafter the Age Discrimination Act) provides that it is unlawful for a labor organization

> (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his age;
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.
> 29 USC §623(c).

This Act contains the following definition of a "labor organization":

> The term 'labor organization' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization...
> 29 USC §630(d)

Finally, the Act provides that it is not unlawful for a labor organization or employer

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a

> retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act... 29 USC §623(f)

Reading these sections together, it is clear that the plaintiff's burden in this case is twofold: he must show that the Pension Trust is subject to the Act; and, he must show that the retirement policy does not come within the "bona fide retirement plan" exception to the Act. The District Court held that the plaintiff had failed in both respects. (A-68-69).

In order to accomplish the result sought, the trustees enacted a resolution which provided the following: (A-8, 50-51).

1. All men working under authorization granted under the "swinging door" policy were to stop working immediately and permanently.

2. These men were required to resign from the union.

3. These men were required to surrender their merchant mariner's documents, without which they could not lawfully work at their occupation.

4. Failure to comply with these requirements would result in the permanent forfeiture of all pension rights.

5. The plaintiff alleged that the union had unlawfully exerted its positions of the board of trustees in order to cause the adoption of the resolution. (A-8).

These allegations clearly make out a claim of Agency between the union and the Pension Trust. In Local No. 2 v. Paramount Plastering Co., 310 F.2d 179 (9th Cir. 1962), cert. denied 372 U.S. 944 (1963), the Court of Appeals held that a joint labor-management trust is both an "employee representative" for purposes of §§302(a) and (b) of the Taft-Hartley Act and a "Labor Organization" under the Wagner Act, 29 USC §152(5). In other words, the existence of an independent legal entity required by law to protect the fiscal integrity and fairness of an employee pension plan should not be construed to immunize the operation of such pension plans from judicial scrutiny of claims that there is in fact unlawful inter-action between the trustees and the union.

No reason has been offered to buttress a claim that these actions, if independently undertaken by the trustees, could or did in any way benefit the beneficiaries of the trust, i.e., the plan participants. Obviously, the result was to the contrary. On the other hand, the actions are entirely plausible if one accepts the claim that the union was acting to achieve its goals through the Pension Trust.

The plaintiff has alleged the following motives for the abrupt revocation by the trustees of the "swinging door" policy in 1970:

1. The union president was on record as favoring younger members, because they would not be concerned

about retirement benefits, a costly item at the bargaining table. (A-84-85).

2. The union favored a high turnover of members, because new members paid initiation fees and because apprentice applicants attended the Joseph Calhoon Training School. (A-8).

3. The slowdown of the Vietnam conflict produced a sharp decrease in the need for marine engineers and the union wished to decrease the number of active workers. (A-5).

Under these circumstances, the retirement plan is clearly a subterfuge designed to accelerate the retirement of older workers in favor of younger ones, and the Act's exception has no application. The plaintiff should have been accorded the opportunity to prove these allegations after full pre-trial discovery.

Conclusion

The judgment of the district court should be reversed, and this case should be remanded with directions that the defendants shall answer, and the appellant should be awarded such other and further relief as may be just.

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Defendants-Appellees.

AFFIDAVIT OF SERVICE BY MAIL

Index No.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ELIZABETH MELENDEZ, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 3 Haven Plaza, New York, New York.

That on the 5th day of March , 1974, deponent served the within APPELLANT'S BRIEF and APPENDIX

upon Morton M. Maneker
Proskauer Rose Goetz & Mendelsohn, 300 Park Avenue,
New York, New York 10022

the address designated by said attorney for that purpose by depositing a true copy of Appendix and two copies of brief in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Elizabeth Melendez
ELIZABETH MELENDEZ

Sworn to before me this
5th day of March 1974.

Jonathan A. Weiss

JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4207275
Qualified in New York County
Commission Expires March 30, 1975